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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

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No. .....

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THE PURE OIL COMPANY,
Appellant,

vs.

JOHN W. PECK, ETC.,
Appellee.

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## JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of the state of Ohio, entered on December 15, 1954, which became final upon denying an application for rehearing, seasonably filed, on January 5, 1955. This judgment of the Supreme Court of Ohio affirmed a decision of the Board of Tax Appeals of the state of Ohio upholding the taxation by Ohio of certain out-of-state deposits of

funds required to be held by appellant in a fiduciary or trust capacity for the United States, other state and local governments, and non-residents of Ohio. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW.

The opinion of the Supreme Court of Ohio from which this appeal is taken is reported in 162 Ohio State 375. Copies of such opinion and journal entry of the Board of Tax Appeals of the state of Ohio are appended hereto as Appendix A. The journal entry of the Board of Tax Appeals is unreported.

## GROUNDS ON WHICH JURISDICTION IS INVOKED.

(i) This suit was brought under Section 5717.04 of the Revised Code of Ohio set forth in Appendix B on direct appeal to the Supreme Court of Ohio from the Board of Tax Appeals of the state of Ohio.

(ii) The judgment of the Supreme Court of Ohio was entered on December 15, 1954. Application for rehearing was filed on December 28, 1954, which was denied by the Supreme Court of Ohio on January 5, 1955. Notice of appeal was filed in the Supreme Court of Ohio on February 1, 1955.

(iii) The jurisdiction of the Supreme Court of the United States to review the aforesaid decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

(iv) The following cases sustain the jurisdiction of this court to review the aforesaid judgment. **Greenough v. Tax Assessors of the City of Newport**, 331 U. S. 486; **Brooke v.**

**Norfolk**, 277 U. S. 27; **Safe Deposit & Trust Co. v. Virginia**, 280 U. S. 83; **Graves v. Schmidlapp**, 315 U. S. 657.

(v) This appeal involves the validity of the construction of Sections 5701.05 and 5709.02 of the Ohio Revised Code:

> Section 5701.05. As used in Title LVII of the Revised Code, "deposits" includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account, certificates of running, or other withdrawable stock, or otherwise, excepting:
>
> (A) Unearned premiums and surrender values under policies of insurance;
>
> (B) Such deposits in financial institutions outside this state as yield annual income by way of interest or dividends in excess of four per cent of the principal sum so withdrawable.
>
> Section 5709.02. All money, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, except as provided in this section or as otherwise provided or exempted in Title LVII of the Revised Code; but the good will, license, or franchise of a business, whether granted by governmental authority or otherwise, shall not be considered property separate from the other property used in or growing out of such business. Property of the kinds mentioned in section 5709.03 of the Revised Code, used in and arising out of business transacted in this state by or on behalf of a nonresident person, other than a foreign insurance company as defined in section 5725.01 of the Revised Code, and nonwithdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by or on behalf of such persons, and nonwithdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall

not be subject to taxation. Such property subject to taxation shall be entered on the classified tax list and duplicate of taxable property, or on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of the treasurer of state.

A corporation shall not be required to list any of its investments in the stocks of any other corporations or in its own treasury stock.

Another statute is involved, but is not claimed to have been invalidly construed. This statute is Section 5725.03, Ohio Revised Code, set out in Appendix C.

## QUESTIONS PRESENTED.

This appeal involves the constitutional power of the state of Ohio to impose a property tax on fiduciary or trust funds of a person domiciled in Ohio, which funds are on deposit in banks outside of Ohio, and which funds are segregated and classified on the books of record or account of such person, and represent (i) taxes imposed upon persons other than appellant by the United States and other states or local governments which appellant is required to withhold or collect by federal or other state law for the United States and other state and local governments, (ii) impounded royalties belonging to lessors under producing oil leases which appellant is required to hold in trust pending final determination of disputes determining the ownership of such royalties. The questions presented are; first, whether or not the taxation by Ohio, under Sections 5701.05 and 5709.02 of the Ohio Revised Code, of such deposits representing funds which appellant is required by law to set aside and hold constitutes an unlawful interference with and burden upon the exercise of the taxing power of the United States and other state and local governments; and,

second, whether or not such attempted taxation constitutes an unlawful attempt by the state of Ohio to exercise its taxing power extra-territorially, and thus deny appellant due process of law, contrary to and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE.

The appellant is a corporation, organized under the laws of the state of Ohio, with its principal office in Chicago, Illinois. It is a producing, refining and marketing oil company, doing business in many states.

The appellant duly filed an annual Ohio personal property tax return for the years 1950 and 1951, at the times and in the manner prescribed by law, and paid a tax in an amount computed on the basis of said returns. Thereafter, the Tax Commissioner of Ohio made additional personal property tax assessments against the appellant on items which were not listed in or which were omitted from appellant's returns for the years 1950 and 1951. These items, which are the subject of this appeal were stipulated as:

Product taxes imposed on consumers of gasoline, oil and kindred products by the federal government and foreign state and local governments upon consumers of such products which are collected by appellant for the various taxing authorities in the capacity of agent.

Federal income taxes upon employees of appellant, which are required by the Internal Revenue Code to be withheld by appellant.

Federal taxes on dividends payable which have been declared and are payable to aliens, which are imposed upon such aliens and which are required to be withheld by appellant under the provisions of the Internal Revenue Code.

Impounded royalties representing royalties due lessors under producing oil leases which belong to the royalty owners but which are impounded and segregated on the books of the appellant and held by appellant as trustee for the benefit of the real owner pending final determination of disputes affecting such royalty ownership.

On April 29, 1952, appellant filed with the Tax Commissioner an application for review and redetermination of the additional personal property tax assessments upon the foregoing deposits for the years 1950 and 1951, in which appellant submitted that the above listed items were not subject to Ohio personal property taxes for the years noted. On July 14, 1953, the Tax Commissioner entered an order holding that there was no error in such assessments.

From this order of the Tax Commissioner of Ohio a notice of appeal was duly filed by appellant with the Board of Tax Appeals of the state of Ohio on October 20, 1953, in the manner required by law.

The case was heard and submitted to the Board of Tax Appeals and on March 11, 1954, the Board of Tax Appeals denied the appeal of appellant and affirmed the action of the Tax Commissioner. Application for reconsideration was filed March 12, 1954, and was denied in an entry dated March 22, 1954.

Appellant filed a statutory appeal (see Appendix B) on March 24, 1954, from said decision of the Board of Tax Appeals to the Supreme Court of Ohio and in its assignment of errors filed with said court set forth the statutory grounds for appeal; to wit, that the decision of the Board of Tax Appeals was contrary to law and was unreasonable and unlawful. The Supreme Court of Ohio affirmed the Board of Tax Appeals in a decision rendered December 15, 1954, which became final on January 5, 1955.

The constitutional question was raised in these proceedings in the "reply brief of appellant" filed in the Supreme Court of Ohio before hearing. The language raising such question can be found on pages 5 and 8 of said brief and reads as follows:

> "As to deposits of federal income taxes on the income of out-of-state employees, these, of course, belong to the federal government and are 'a special fund in trust for the United States' (see p. 5 of our original brief). Section 5725.03 expressly exempts deposits belonging to the federal government.
>
> "As to the remaining funds which belong to aliens, nonresidents and other state and local governments, none of which are located in Ohio, no argument is necessary to show that Ohio has no constitutional power to exercise its taxing power extra-territorially, under the Fourteenth Amendment to the Constitution of the United States.
>
> (See page 3 reply brief of appellant)
>
> "The point is then made that deposits in out-of-state banks may be taxed by the state of domicile of the depositor. This is entirely correct and Ohio does tax out-of-state deposits belonging to its taxpayers. But it does not follow that Ohio may tax out-of-state deposits **which belong to non-residents, the federal government and other states, which is the case at bar.** To attempt to do so would violate the Fourteenth Amendment. **Safe Deposit & T. Co. v. Virginia,** 280 U. S., 83."
>
> (See page 8 reply brief of appellant.)

The Tax Commissioner and the Board of Tax Appeals do not have jurisdiction to consider the constitutionality of the statutes of the state of Ohio and it was not proper to raise a federal question in the application for review and redetermination before the Tax Commissioner or on appeal to the Board of Tax Appeals. The commissioner and the Board of Tax Appeals are administrative officers and possess only such quasi-judicial powers as are conferred by

statute. This is well illustrated in **Zangerle v. Evatt,** 139 O. S. 563, in which the court states on page 570 of the opinion:

> "The Board of Tax Appeals is a quasi-judicial body in discharging a part only of its functions (Sections 1464-1 and 1464-2, General Code). It has many purely administrative powers and duties. Indeed, all of the powers, duties and functions of the Department of Taxation are divided between the Board of Tax Appeals and the Tax Commissioner (Section 1464-1 et seq., General Code.)"

That the Supreme Court of Ohio is not precluded from considering the constitutionality of a statute which is raised for the first time in that court on appeal from an administrative board is established by the case of **East Ohio Gas Co. v. Public Utilities Commission of Ohio,** 137 O. S. 225. On pages 237 and 238, the per curiam opinion states:

> "Constitutionality of Appeal Statutes.
>
> Counsel for the gas company urge that a consideration of the constitutional questions presented in the brief of the city is precluded by reason of the fact that such questions were not raised before the commission and are not referred to or stated in the application for rehearing before the commission. * * *
>
> "In the instant case, the application for rehearing was filed and the appeal taken within the required time. It seems quite obvious that the requirement of the filing of an application for rehearing contemplates the enumeration only of the grounds which the Public Utilities Commission would be authorized to consider and determine. It was the manifest duty of the commission to proceed under and in accordance with the terms and provisions of the statute with the assumption of its constitutionality. Constitutionality of statutes is a question for the courts and not for a board or commission."

See also 1 Ohio Jurisprudence 2nd, Administrative Law and Procedure, Section 210.

Under Section 2505.21 of the Ohio Revised Code it is proper for an appellant before the Supreme Court of Ohio to raise a federal question in the brief or reply brief filed with the court before hearing, as was done in this case. Said section provides in part as follows:

> "Appeals taken on questions of law shall be heard upon assignment of error filed in the cause or set out in the briefs of appellant before hearing."

The time and method of raising the federal question in the Supreme Court of Ohio, as set forth above, has been held by this court to be sufficient to sustain its jurisdiction. **Municipal Investors Association v. City of Birmingham,** 316 U. S. 153; **Green Bay & Mississippi Canal Company v. Patten Paper Company,** 172 U. S. 58; **International Harvester Company of America v. State of Missouri,** 234 U. S. 199.

In its decision the Ohio Supreme Court ignored the question raised by the appellant that the application of the Ohio tax statutes so as to tax out-of-state deposits required to be held by appellant in a fiduciary capacity would violate the Fourteenth Amendment and that such statutes, therefore, were repugnant to the Constitution of the United States.

## SUBSTANTIALITY OF QUESTIONS INVOLVED.

This appeal presents a question of a state attempting to exercise its taxing power extra-territorially to an extent beyond that ever sanctioned by this court, and contrary to the decisions of this court. It also presents a question of the power of a state to interfere with the exercise of the taxing power of the United States and other state and local governments, by Ohio placing an additional financial burden upon persons required to collect or withhold taxes for the United States and other local governments.

It is established that an appeal will not be dismissed for want of a substantial federal question unless the contentions of appellant are "clearly not debatable and utterly lacking in merit" **Hamilton v. Regents of Unv. of Cal.**, 293 U. S. 245, 258. **Alton RR Co. v. Ill. Commerce Commission**, 305 U. S. 548, 550. **Chesebro v. Los Angeles County Flood Control District**, 306 U. S. 459, 463.

The greatest extent to which states have been sustained in the taxation of out-of-state intangibles of persons domiciled therein is in the recent closely analogous case of **Greenough v. Tax Assessors**, 331 U. S. 486, in which the majority of this court sustained the power of a state to tax the corpus of a voluntary out-of-state trust held for out-of-state beneficiaries. In the majority opinion it was pointed out that the trustee could reimburse himself from the corpus of the trust for the amount of such state tax. In the concurring opinion, however, of Mr. Justice Frankfurter it was stated that the state of domicile of the trustee had power to tax the out-of-state corpus regardless of whether or not the trustee could reimburse himself, saying that "a trusteeship is a free undertaking."

In the case at bar, appellant is acting in a trust or fiduciary capacity by operation of law. Appellant's trusteeship here is not "a free undertaking". The funds which appellant is required to withhold as collecting agent for the federal government and for other state and local governments, and the funds which he is required to hold as trustee for out-of-state beneficiaries which are impounded pending the outcome of litigation, and all of which appellant carries as deposits in out-of-state banks, are not in any sense any part of the wealth of appellant from which appellant received any benefit as a result of having temporary custody of such funds as stakeholder or collecting agent. His is a

bare legal interest in these funds imposed upon him by federal law and the laws of other states. As to federal funds collected or withheld, 26 U. S. C. Section 1441 provides, as it did before, that:

> "Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. * * *"

This case is clearly distinguishable from that before this court in **Greenough v. Tax Assessor**, supra, where the trusteeship was a free undertaking.

Appellant respectfully represents that the questions presented here are substantial because a decision by the Supreme Court of the United States on these questions will remove grave uncertainty as to whether or not there is any limit to the extent that the several states may extra-territorially tax intangibles of persons domiciled therein. The seizure of property by a state under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and the denial of due process of law. **Miller Brothers Company v. State of Maryland**, 347 U. S. 340.

Wherefore, appellant, The Pure Oil Company, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal under 28 United States Code, Section 1257 (2).

Respectfully submitted,

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## APPENDIX A.

### Opinion of the Supreme Court of Ohio.

Appellant contends that the Ohio intangible tax on deposits is determined by the taxable status of the person having the beneficial interest therein, rather than the taxable status of the person having the right of withdrawal. Appellant claims further that the deposits in question were held by it in a fiduciary capacity only; that it had no beneficial interest therein; but that, on the other hand, they belonged to persons and governmental authorities and, therefore, were not subject to taxation.

The sole question presented is whether general deposits in out-of-state banks, withdrawable as such by a corporate depositor domiciled in Ohio, but which were held unsegregated and undesignated by such depositor as taxes collected for federal and state governments, taxes on dividends payable to aliens under provisions of the Internal Revenue Code, funds for the payment of dividends to holders of record of preferred and common shares of the depositor, declared as of a previous date but payable on a subsequent date, and royalties due to owners of oil leases, were taxable as deposits of such depositor by the taxing authorities of the state.

In support of its claim that the taxation of deposits of an Ohio depositor depends upon the taxable status of the person owning the beneficial interest therein as shown on the books of the depositor rather than upon the taxable status of the depositor, appellant cites the case of Ohio Citizens Trust Co. v. Evatt, Tax Commr., 146 Ohio St., 30, 63 N. E. (2d), 912, wherein this court held:

"Money and funds collected by the Superintendent of Banks in the process of liquidation of a closed bank, or

money and funds collected by the Superintendent of Building and Loan Associations in the process of liquidation of a closed building and loan association, and deposited by either of them in an open financial institution fall within the definition of deposits of 'any other financial institution' and, under Section 5406, General Code, are not required to be returned as taxable deposits by such open financial institution."

That case, however, dealt with the funds of a closed bank in the hands of the Superintendent of Banks, which had been deposited in an open financial institution pending the liquidation or reopening of the closed bank. This court held that those funds were still the property of the closed bank, even though deposited after the closing, and for that reason were still the funds and in fact the deposits of the closed bank in another financial institution; and that they were not taxable in the hands of the Superintendent of Banks or as funds of the open bank.

In the instant case, the funds in question had never become the property of the so-called beneficiaries because they had never been segregated, paid, or distributed to them by the appellant so that it could become a custodial agent as to the funds deposited in the out-of-state banks with ownership in each of the so-called beneficiaries.

The appellant cites also Merchants & Mechanics Federal Savings & Loan Assn. v. Evatt, Tax Commr., 138 Ohio St., 457, 35 N. E. (2d), 831, 135 A. L. R., 1474, and Second Federal Savings & Loan Assn. v. Evatt, Tax Commr., 141 Ohio St., 616, 49 N. E. (2d), 756, in support of its position. Both of those cases dealt with "due-borrowers accounts on construction-mortgage loans," where notes and mortgages had been given to the associations for the full amount of the loans, with an arrangement that the funds should be paid

out for construction as it proceeded. This court held that a debtor-creditor and not a fiduciary relationship existed between the borrowers and the associations as to the funds in question until they were paid out, and that such funds in the interim were taxable as deposits of the borrowers.

In the instant case, no relationship existed whereby the funds in the hands of the appellant were the funds of the so-called beneficiaries or could be ordered paid out and distributed by them.

In the Merchants & Mechanics case, Judge Williams said:

"In determining the rights of the parties mere matters of bookkeeping do not control. * * * It is the contractual relations of the parties that must govern, and methods of bookkeeping and entries made are of importance only for their bearing on what the contractual rights and obligations are."

It is a fundamental rule that taxes on intangible personal property must be assessed according to the taxable status of the owner of record of such property, unless the taxing statutes specifically exempt or otherwise direct. On this point, it is stated in 51 American Jurisprudence, 488, Section 479:

"A general deposit in a bank creates the relation of debtor and creditor between the bank and the depositor, constituting intangible rather than tangible property, and the courts agree that both as a matter of constitutional law and statutory construction, such a deposit has a situs for the purposes of property taxation in the state where the depositor is domiciled."

For the purpose of taxation, "deposits" are defined in Section 5324, General Code (Section 5701.05, Revised Code), as follows:

"The term 'deposits' as so used, includes every deposit which the person *owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money* • • •." (Emphasis added.)

This court in the Merchants & Mechanics case defined special and general deposits as follows:

"A *special deposit* is one in which the money deposited is held in trust or bailment by the financial institution. A *general deposit* is one by which funds are left on deposit without specification or restriction as to use by the depositee or as to the purpose to which they may be put by or on behalf of the depositor. Such a deposit gives rise to the relationship of debtor and creditor. Fulton, Supt. of Banks, v. Escanaba Paper Co., 129 Ohio St., 90, 193 N. E., 758; Busher, Clerk, v. Fulton, Supt. of Banks, 128 Ohio St., 485, 191 N. E., 752. Money deposited for a definite purpose without any agreement or understanding that it shall not be used by the depositee for its own purposes is a *general deposit for a specific purpose* or, as it is sometimes called, *a specific deposit* and creates the relation of debtor and creditor just as in the case of a general deposit. Squire, Supt. of Banks, v. American Express Co., 131 Ohio St., 239, 249, 2 N. E. (2d), 766; Squire, Supt. of Banks, v. Oxenreiter, 130 Ohio St., 475, 200 N. E., 503." See, also, Second Federal Savings & Loan Assn. v. Evatt, Tax Commr., supra.

Section 5328-1, General Code (Section 5709.02, Revised Code), enumerates the various classes of personal property which shall be taxed. The pertinent part of such section is as follows:

"All • • • deposits • • • of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title • • •."

Section 5328-2, General Code (Section 5709.03, Revised Code), fixes the taxable situs of certain classes of property. The pertinent part of the section is as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"* * *

"In the case of deposits (other than such as are used in business outside of such other state), when withdrawable in the course of such business by an officer or agent having an office in such other state; but deposits representing general reserves or balances of the owner thereof, maintained for the purpose of his entire business wherever transacted, shall be considered located in the state wherein the owner resides, if an individual, * * * if a corporation, by whomsoever they may be withdrawable."

Section 5406, General Code (Section 5725.03, Revised Code), relates to deposits returnable by financial institutions and, by reference to Section 5324, excludes from taxation certain deposits of such institutions located without the state. However, since the appellant was not and does not claim to have been a financial institution, but was a commercial corporation, these provisions have no relevancy here.

This court in the case of Cleveland & Western Coal Co. v. O'Brien, Treas., 98 Ohio St., 14, 120 N. E., 214, held:

"Money of a corporation organized under the laws of Ohio on deposit in a bank located outside of the state of Ohio is, under the provisions of Section 5328, General Code, subject to taxation in this state."

The Board of Tax Appeals in referring to the taxability of the deposits in question in the instant case said:

"There is a certainty that the relationship existing between Pure Oil and its depositories of these deposits is that of debtor-creditor; and that since these deposits are general ones, unsegregated in these banks for any particular purpose, Pure Oil could cause these deposits at any time to be disbursed generally in Ohio or elsewhere as it might choose. It could use any funds it possessed, wherever deposited, in payment of these sums due. Those holding the so-called beneficial interest in and to this portion of Pure Oil's deposits have no right to withdraw these funds. Neither may the banks withhold them from Pure Oil, or hold them for the benefit of the so-called parties having a beneficial interest."

This court is in agreement with that statement of the facts and the law, and finds that the deposits in question were taxable, as determined by the Board of Tax Appeals.

The decision of the Board of Tax Appeals is affirmed.

Decision affirmed.

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**Entry of the Board of Tax Appeals.**

[Dated March 11, 1954.]

This appeal is from an increased intangible personal property tax assessment made by the Tax Commissioner as against appellant for the tax years 1950 and 1951. The order bears date of October 14, 1953.

The cause now comes on for further and final consideration upon the commissioner's transcript, the taxpayer's notice of appeal, a stipulation of facts and briefs of counsel.

The property assessed, the taxability of which is now questioned by this appeal, consists of deposits of appel-

lant, an Ohio corporation, in banks outside of Ohio. These deposits are not designated in the banks as deposits for a particular purpose, but they are classified in the taxpayer's records or books of account. They are divisible into five classes:

"(a) Product taxes imposed on consumers of gasoline, oil and kindred products by the Federal government and foreign state and local governments upon consumers of such products which are collected by appellant for the various taxing authorities in the capacity of agent.

"(b) Federal income taxes upon employees of appellant, which are required by the Internal Revenue Code to be withheld by appellant.

"(c) Federal taxes on dividends payable which have been declared and are payable to aliens, which are imposed upon such aliens and which are required to be withheld by appellant under the provisions of Section 143 (3) (b) of the Internal Revenue Code.

"(d) Funds segregated on the books of the appellant on tax listing day for the payment of preferred and common dividends to stockholders of record as of a previous date and payable at a subsequent date, which funds customarily do not represent the entire amount of dividends payable at such subsequent dividend payment date, but only such part of the amount of dividends declared as have been segregated and set up in a separate cash account on appellant's books by tax listing day, instead of having been turned over to the custody of the paying agent to be held for the benefit of the stockholders of record on such earlier date.

"(e) Impounded royalties representing royalties due lessors producing oil leases which belong to the royalty owners but which are impounded and segregated on the books of the appellant and held by appellant as trustee for the benefit of the real owner pending final determination of disputes affecting such royalty ownership. The bank deposit does not identify The Pure Oil Company as trustee."

The Tax Commissioner found that "two elements are essential and prerequisite to the taxation of 'deposits' ": (1) The credit arising out of the debtor-creditor relationship, and (2) the right to withdraw the funds on deposit vested in the creditor-depositor. Finding that appellant possessed both the credit and right to withdrawal, the commissioner assessed these deposits.

Appellant contends "that the Ohio intangible tax on deposits depends upon the taxable status of the person having the beneficial interest therein, rather than the taxable status of the person having the right of withdrawal". Appellant further says that the deposits which appellee has assessed are held by it only in a fiduciary capacity and that it has no beneficial interest therein. It also says that the assessments are made upon deposits belonging to persons and governmental authorities not subject to taxation in the state.

Revised Code Section 5701.05 (G. C. Sec. 5324), found in the definitive chapter on taxation, defines "deposits" as follows:

> "The term 'deposits' as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable."

Revised Code Section 5709.02 (heretofore G. C. Section 5328-1) enumerates the property to be entered on the classified tax list and duplicate. Its applicable portion reads:

> "All * * * deposits * * * of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; * * * Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, * * * shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, * * * shall not be subject to taxation. * * *"

Revised Code Section 5709.03 (heretofore G. C. Section 5328-2) fixes the taxable situs of certain classes of property. It provides in part:

> "Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:
>
> "In the case of deposits (other than such as are used in business outside of such other state), when withdrawable in the course of such business by an officer or agent having an office in such other state; but deposits representing general reserves or balances of the owner thereof, maintained for the purpose of his entire business wherever transacted, shall be considered located in the state wherein the owner resides, if an individual, * * * if a corporation, by whomsoever they may be withdrawable."

At this point the board deems it advisable to point out that G. C. Section 5406 (now R. C. Sec. 5725.03) has to do with deposits returnable by financial institutions. This section contains certain named exceptions of certain char-

acter of deposits which need not be included in their returns. The Pure Oil Company, however, is not a financial institution, but a producing and commercial corporation. We cannot see that this section of the Code plays any part in solution of the present problem. The same is true in part of the applicability of reported cases in which deposits of financial institutions were involved or R. C. Section 5725.03 was in some way applicable. We do not believe that the words "in this title" appearing in G. C. Section 5328-1, extend the provisions of G. C. Section 5406 any further than the purpose covered by the latter section.

General Code Section 5324 (now Revised Code Section 5701.05), in defining "deposits", sets up but two exceptions. Exception (1) is in no way applicable here. Exception (2) provides as follows: "Such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable". The exclusion of this class of income producing deposits in financial institutions is indicative of the purpose of the legislature to include within the definitions all other classes of deposits within the defined term "deposits". If the deposits in issue are subject to exception or exclusion, that purpose must appear within the provisions of G. C. Sections 5328-1 and 5328-2 (now Revised Code Sections 5709.02 and 5709.03) or elsewhere within the Code.

The stipulation of essential facts, as hereinbefore set forth, are said by appellant to be entirely sufficient to display the errors complained of and to warrant the relief herein sought. The stipulation, of course, supplements any fact and matter found within the commissioner's transcript. This document contains the appellant's returns for the years 1950 and 1951 and consolidated balance sheets,

claims for reduction of property under construction and their allowance by the commissioner as shown by his order; Schedule 8, page 14 thereof showing appellant's total general deposits, less such as are in Ohio banks; an examiner's analysis of all changes made; the application for review, the taxpayer's brief, and the final order complained of. From these returns we gain the information that appellant's principal office and place of doing business is in Chicago, Illinois. We have previously noted the brevity of the stipulated facts. We wish now to note, if such matters are material, that there is no evidence before this board as to where the business was transacted which produced these funds; that is, in Ohio or elsewhere. There is likewise no evidence as to where these deposits, particularly (a), (d), and (e), are to be used in business, that is disbursed, whether in Ohio, or elsewhere, or generally. There is no evidence as to whom and from where these deposits are to be disbursed.

Due to these omissions we assume that appellant's sole claim of error rests on the proposition that these deposits are excepted or exempted from return for personal property taxation because they are exempted by statutory provision, and prior determinations of this board and by long continued practice.

There is a certainty that the relationship existing between Pure Oil and its depositories of these deposits is that of debtor-creditor; and that since these deposits are general ones, unsegregated in these banks for any particular purpose, Pure Oil could cause these deposits at any time to be disbursed generally in Ohio or elsewhere as it might choose. It could use any funds it possessed, wherever deposited, in payment of these sums due. Those holding the so-called beneficial interest in and to this portion of Pure

Oil's deposits have no right to withdraw these funds. Neither may the banks withhold them from Pure Oil, or hold them for the benefit of the so-called parties having a beneficial interest.

G. C. Section 5328-1 (now R. C. Sec. 5709.02) states that "All • • • deposits • • • of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title;". This section and its close associate (G. C. Section 5328-2) contain no such provisions as are found in G. C. Section 5406 (now R. C. Sec. 5725.03), which direct that a certain class of taxpayers—that is, financial institutions—need not include within their returns certain items that are exempted therefrom. Sections 5328-1 and 5328-2, however, do contain certain conditions which, if found to exist, establish the situs different from that of the domicile of the taxpayer. We again call attention to the wording of G. C. Section 5324 which reads that "the term 'deposits' as so used, includes every deposit • • •." In Kroger v. Evatt, 149 O. S., 448 the court was considering the taxable situs of property (deposits) of a resident corporation, not a financial institution. On pages 451, 452 and 453, the court observes:

> "Under certain circumstances, deposits of a corporation can, for tax purposes, acquire a situs different from that of the domicile of the owning company. The conditions which must be met under Ohio statutes to establish a situs for deposits of a company other than the domicile of the company are set forth in Sections 5328-1 and 5328-2, General Code, • • •
>
> "In order for a deposit to have a tax situs outside Ohio, all the conditions contained in Section 5328-2, General Code, must be complied with. One of the conditions is that the funds must be 'withdrawable in the course of such business by an officer or agent having an office in such other state.'

> "Another condition of Sections 5328-1 and 5328-2, General Code, is that the deposits must be used in business in such other state."

A reading of the Kroger case, supra, and the court's observations, it is made clear that any exceptions or exemptions from the listing of "all" deposits by a corporation other than financial, as contained within these two sections, are in fact conditions which produce exemption from Ohio taxation, "all" of which must be met.

Appellant relies strongly upon the Kroger case, supra, for support of its theory that "the Ohio intangible tax on deposits depends upon the taxable status of the persons having the beneficial interest therein, rather than the taxable status of the person having the right of withdrawal".

We make two further comments concerning the Kroger case. G. C. Section 5406 is nowhere therein mentioned. The law of the case, as found in the syllabi, does not approve or disapprove of the question of segregation. The court simply was considering the Tax Commissioner's order as it found it. It simply found that the minimum balances which were in question were not withdrawable in the course of business outside Ohio, and hence had a tax status in Ohio, for the reason that the deposits did not comply with "all" the provisions of the companion statutes, 5328-1 and 5328-2.

In enacting these statutes, the legislature was not engaged in providing for the taxation of federal and state property. The deposits here taxed are not the property of the federal and state governments, but the property of a resident corporation, other than a financial institution. Appellant only was the general creditor of its depository banks. It only could withdraw these deposits. The federal and state governments and creditors of appellant had no

interest or claim in these particular deposits. The legislature, under its prerogative of classifying personal property, could have included the provisions found applicable to returns of financial institutions as in G. C. Section 5406. But it did not do so. It went no further than to provide that the two exceptions found in G. C. Section 5324, and the conditions found in G. C. Sections 5328-1 and 5328-2, were the only cases wherein a resident corporation, other than financial, might be excused from making return of "all" and "every" deposit it possessed. Appellant seeks to write in a further exclusion, that of segregation on the books of the taxpayer, and a looking to the right of one having a beneficial interest therein, which in fact is nothing more than the right possessed by any of appellant's creditors.

We find no error in the order complained of. It may, therefore, be and is now affirmed.

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## APPENDIX B.

### Section 5717.04, Ohio Revised Code.

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business.

In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county. * * *

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, re-assessments, valuations, determinations, findings, computations, or orders made by him may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of finance, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the commissioner. * * *

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. Such notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal. * * *

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification. * * *

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## APPENDIX C.

### Section 5725.03, Ohio Revised Code.

The deposits required to be returned by financial institutions pursuant to sections 5725.01 to 5725.26, inclusive, of the Revised Code, include all deposits as defined by section 5701.05 of the Revised Code to the extent that such deposits are made taxable by section 5709.02 of the Revised Code, except:

(A) Deposits belonging to the federal government or any instrumentality thereof;

(B) Deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies, or the furnishing of services pursuant to authority of any act to further the war effort;

(C) Deposits belonging to the state or any county, municipal corporation, school district, township, or other subdivision thereof, or to any other financial institution, dealer in intangibles, domestic insurance company, or institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit of any class

required to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items credited thereto, one half of the amount so represented shall be considered as withdrawable and shall be included in arriving at the aggregate balance of taxable deposits required to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited.

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3 Ohio Jurisprudence, 2d, Section 546, page 458 ..... 5

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

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No. .....

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THE PURE OIL COMPANY,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO,

Appellee.

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## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee in the above entitled cause, for its statement in opposition to appellant's statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm, respectfully states the following:

I.

**Statement of Issue on Appeal.**

Appellant is a corporation, organized under the laws of Ohio. During the tax years in question appellant maintained deposits in banks outside the state of Ohio. These deposits were not designated in the banks as deposits for a particular purpose but were classified in appellant's books of account. Ohio levies a tax on deposits of persons residing in Ohio. The pertinent sections of the Ohio law are as follows:

Section 5324, General Code (Section 5701.05, Revised Code):

> "The term 'deposits' as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable."

Section 5328-1, General Code (Section 5709.02, Revised Code):

> "All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; but the good will, license or franchise (whether granted by governmental authority or otherwise) of a business shall not be considered to be property separate from the other property used in or growing out of such business. Property of the kinds and

classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock."

The Supreme Court of Ohio in its decision in the instant case after a discussion of the quoted statutes adopted the holding of the Ohio Board of Tax Appeals as follows, 162 Ohio St., at page 383:

"'There is a certainty that the relationship existing between Pure Oil and its depositories of these deposits is that of debtor-creditor; and that since these deposits are general ones, unsegregated in these banks for any particular purpose, Pure Oil could cause these deposits at any time to be disbursed generally in Ohio or elsewhere as it might choose. It could use any funds it possessed, wherever deposited, in payment of these sums due. Those holding the so-called beneficial interest in and to this portion of Pure Oil's deposits have no right to withdraw these funds. Neither may the banks withhold them from Pure Oil, or hold them for the benefit of the so-called parties having a beneficial interest.'

> This court is in agreement with that statement of the facts and the law, and finds that the deposits in question were taxable, as determined by the Board of Tax Appeals."

The appellant now seeks to invoke the jurisdiction of this court contending that the decision below exercises the taxing power of the state of Ohio extra-territorially to an extent beyond that ever sanctioned by this court and contrary to the decisions of this court and that the exercise of said taxing power interferes with the taxing power of the United States and other state and local governments.

## II.

### The Question of Constitutionality Was Not Properly Raised in the Supreme Court of Ohio.

Appellant challenged only the decision of the appellee and the Ohio Board of Tax Appeals that the deposits in issue were deposits of the appellant within the scope of Section 5324, General Code (Section 5701.05, Revised Code).

(See opinion of Supreme Court of Ohio attached as Appendix A to appellant's statement in support of jurisdiction of the Supreme Court of the United States, reported in 162 Ohio St., 375.)

Appellant did not draw into question the validity of Section 5324, General Code (Section 5701.05, Revised Code), on the ground of its being repugnant to the Constitution or laws of the United States. *Wilson v. Cook*, 327 U. S., 474, 482.

The appellant maintains the constitutional question was raised in argument in its reply brief (page 7, appellant's jurisdictional statement); however, appellant did not set forth any constitutional question in its assignment of error

either in its notice of appeal to the Ohio Supreme Court or in its brief.

Section 5717.04, Revised Code of Ohio, provides for appeals from the Ohio Board of Tax Appeals to the Ohio Supreme Court. (Appendix B, appellant's jurisdictional statement.) This section provides in part:

> "* * * Such notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. * * *"

Section 2505.21, Revised Code of Ohio, provides for hearing appeals upon assignment of error filed in the cause or set out in the briefs. Said section reads as follows:

> "Appeals taken on questions of law shall be heard upon assignment of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded.
>
> An appeal taken on questions of law and fact entitles the party to a hearing and determination of the facts de novo which shall be upon the same or amended pleadings."

3 *Ohio Jurisprudence*, 2nd, Appellate Review, Section 546, page 458, states:

> "In later cases also, both before and after the effective date of the Appellate Procedural Act, the courts have repeatedly asserted that they are not required to search for, or, as it is sometimes put, embark on a voyage to discover, errors which are not specifically assigned, * * *"

*Levi v. Daniels*, 22 Ohio St., 38; *Clark v. Bayer*, 32 Ohio St., 299; *Howk v. Krotzer*, 140 Ohio St., 100, 110; *Kluth v. Andrus*, 157 Ohio St., 279, 284.

This court has held that raising the question in the manner claimed by appellant is not sufficient to establish that a federal question was raised. *Zadig v. Baldwin*, 166 U. S., 485, 488. See also *Live Oak Water Users' Assoc., et al., v. Railroad Commission of California*, 269 U. S., 354, 357, 358; *Lynch, et al., v. New York, ex rel. Pierson*, 293 U. S., 52, 54.

As stated by the appellant (page 9, jurisdictional statement), the Ohio Supreme Court did not pass on any federal question and this court has held that the fact that the opinion of the state court makes no reference to the particular question sought to be presented in this court, may be considered in determining whether the question was called to the attention of the state court. *Oxley Stave Co. v. Butler County*, 166 U. S., 648, 653; *Kipley v. Illinois*, 170 U. S., 182, 188; *Chicago and Northwestern Railway Co. v. Chicago*, 164 U. S., 454, 457; *Michigan Sugar Co. v. Michigan*, 185 U. S., 112, 113; *New York Central Railroad Co. v. New York*, 186 U. S., 269, 273; *Cleveland & Pittsburgh Railroad Co. v. City of Cleveland*, 235 U. S., 50.

## III.

**A Federal Question Was Not Necessarily Involved in the Cause Presented to the Ohio Supreme Court and the Decision of the Ohio Supreme Court on Adequate Nonfederal Ground Should Not Be Reviewed By This Court.**

The decision of the Supreme Court of Ohio was placed on an independent ground and did not involve a federal question and the independent ground is broad enough to

sustain the judgment. Even assuming that a federal question was properly raised in this case, which we deny, the opinion of the Ohio Supreme Court is silent as to any federal question and no intent to evade a federal question is indicated. In this regard this court ordinarily presumes that the decision is based upon a nonfederal ground raised in the record which is adequate to support it. *Henderson Bridge Co. v. Henderson City*, 141 U. S., 679, 688; *McCoy v. Shaw, State Auditor, et al.*, 277 U. S., 302, 303; *Lynch, et al., v. New York, ex rel. Pierson*, 293 U. S., 52, 54, 55; *Honeyman v. Hanan, Executor*, 300 U. S., 14, 18; *Williams v. Kaiser*, 323 U. S., 471, 477.

## IV.

**No Substantial Federal Question Presented by the Appeal.**

It is submitted that no substantial federal question is presented by this appeal since the deposits in question were general deposits of the appellant subject to the appellant's order and this court has held the resulting credits are taxable by the state of the domicile of the owner even though the deposits are located outside the state of domicile. The holding that the general deposits of the appellant involved in this cause are taxable by the Ohio Supreme Court is consistent with prior decisions of this court. *Fidelity & Columbia Trust Company v. City of Louisville*, 245 U. S., 54; *Baldwin v. Missouri*, 281 U. S., 586, 591.

## MOTION TO DISMISS OR AFFIRM.

For the foregoing reasons and based upon the foregoing authorities, this appellee moves that the court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio.

Respectfullly submitted,

C. WILLIAM O'NEILL,
*Attorney General,*
W. E. HERRRON,
*Assistant Attorney General,*
State House, Columbus 15, Ohio,
*Attorneys for Appellee.*

MAY 16, 1955.

*Decisions Per Curiam.*

No. 659. PURE OIL CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented substantial federal question. *William S. Evatt* and *Robert L. Barton* for appellant. *C. William O'Neill,* Attorney General of Ohio, and *W. E. Herron,* Assistant Attorney General, for appellee. Reported below: 162 Ohio St. 375, 123 N. E. 2d 428.